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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| ANAYANSI COREY,<br>Plaintiff and Appellant,<br>v.<br>LAWRENCE A. MUDGETT III et al.,<br>Defendants and Respondents. | D077532<br><br>(Super. Ct. No. 37-2019-00006030-CU-MC-CTL) |

APPEAL from an order of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Affirmed.

Anayansi Corey, in pro. per., for Plaintiff and Appellant.

Marshall Law and Daniel Marshall for Defendants and Respondents.

Nonlawyers who represent themselves in a civil case involving complicated legal principles are usually at a considerable disadvantage, as would be anyone attempting to perform a complex task without the necessary

training, education, and experience. This case sadly illustrates these perils in the anti-SLAPP context.[1]

It starts simply enough. In 2014, Anayansi Corey paid attorney Lawrence A. Mudgett III $1,500 to file a bankruptcy petition on her behalf. Corey discharged Mudgett before he filed the petition and hired a different lawyer. She asked Mudgett for her money back, but he refused on the grounds that his fee agreement provided the $1,500 was a "true retainer earned upon signing this agreement." Corey initiated nonbinding arbitration, which resulted in a $1,325 award in her favor.

Mudgett filed a superior court action to vacate the award. After conducting a hearing, Judge Shall vacated the award on the grounds that Corey's prepetition claim against Mudgett could only be asserted by her bankruptcy trustee. In the judge's view, the arbitrator lacked jurisdiction. A judgment against Corey for $701 in costs was entered.

Corey might have appealed the order vacating the arbitration award or, perhaps, filed a simple small claims action to get her $1,500 back. But instead, she hired a paralegal, who helped write a superior court complaint (Complaint) against Mudgett. The Complaint alleges various tort causes of action arising out of his conduct in vacating the arbitration award and seeking to collect the $701 judgment.

To characterize the Complaint as ill-advised is an understatement. To anyone with even a rudimentary understanding of the anti-SLAPP statute, it invited a motion to strike—which Mudgett's lawyer filed and not surprisingly won. But from Corey's perspective, the worst was yet to come. The anti-

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1 "SLAPP" stands for "Strategic Lawsuit Against Public Participation." (Code of Civ. Proc., § 425.16.) All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

SLAPP statute also provides for an attorney's fee award to the prevailing defendant. Ultimately, the court awarded Mudgett $17,000 in fees and costs.

Thus, Corey's attempt to recoup $1,500 has evolved into a $17,000 adverse judgment. Moreover, *none* of these rulings can be challenged on appeal. The 2014 order vacating the arbitration award was appealable,[2] but Corey did not seek appellate review. The order granting the anti-SLAPP motion was also appealable,[3] but Corey did not appeal from it either. Nor did she appeal from the subsequent award of attorney's fees and costs. Instead, still self-represented, Corey filed a motion to vacate the judgment of dismissal under section 473, subdivision (b). She claimed that judgment was entered as a result of her excusable neglect—specifically, that while self-represented and "very ill, [she] was unable to file a timely opposition" to the anti-SLAPP motion.

The trial court rejected that argument because there is no evidence to support it. Based on settled law, the court also denied Corey's related motion for leave to file an amended complaint in the case. Only these two rulings are at issue in this appeal.

As we will explain, Corey did not lose the anti-SLAPP motion due to excusable neglect. She appeared at the hearing and, despite the lack of written opposition, Judge Taylor allowed her to present oral argument—an accommodation for a self-represented litigant that a court would rarely afford counsel. Moreover, the next court day after the hearing, Corey filed a written opposition. Again, as an accommodation that no lawyer could reasonably expect to receive, Judge Taylor read and considered the tardy opposition. He concluded that even if it had been timely filed, "it wouldn't have changed

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2 Section 1294, subdivision (c).

3 Section 425.16, subdivision (i).

a thing." Although she argued to the contrary in her motion to vacate the judgment, Corey presented no declaration from a physician or other health care provider to support her claim of illness and disability.

Accordingly, we affirm the order denying the motion to vacate, as well as a related order denying leave to file an amended complaint.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *The Underlying Attorney Fee Dispute*

In 2012, Corey hired Mudgett to file a bankruptcy petition. She gave him financial documents and paid his flat $1,500 fee. After reviewing the file, Mudgett sent Corey an e-mail stating "the tax return was not signed, there was no proof of income from any source, [and] there was not [*sic*] credit report." He gave her the option of either (1) paying $250 more for him to "walk" her through the documents, or (2) reviewing a questionnaire he previously gave her and sending him "complete records (no charge)." Corey instead elected to terminate his services, asked for a "full refund of $1,500," and hired other counsel to file her petition.

Mudgett refused to refund the money, claiming it was a true retainer.[4] Corey initiated nonbinding fee arbitration through the San Diego County Bar Association. As a result of information he learned at that hearing, Mudgett asserted that only the bankruptcy trustee could pursue Corey's claim. He asked the Bar Association to dismiss the arbitration for lack of jurisdiction. The Bar Association denied his request, and the arbitrator issued an award of $1,325 in Corey's favor.

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[4] A true retainer is "a sum of money paid by a client to secure an attorney's availability over a given period of time. Thus, such a fee is earned by the attorney when paid since the attorney is entitled to the money regardless of whether he actually performs any services for the client." (*Baranowski v. The State Bar* (1979) 24 Cal.3d 153, 164, fn. 4.)

Mudgett filed a superior court action against Corey to vacate the arbitration award for lack of jurisdiction. Corey filed opposition and appeared at the hearing. In May 2014, the superior court (Judge Schall) vacated the arbitration award for lack of jurisdiction, and awarded Mudgett $701 in costs. Corey did not appeal.

Mudgett filed an abstract of judgment naming Corey as the judgment debtor for the $701 cost judgment. In 2018, Corey's mother, Graciela Kohlman, was refinancing a real estate loan. The lender showed title was held "in Graciela L. Kohlman and *Alexander* S. Corey" and listed Mudgett's $701 judgment against *Anayansi* Corey as an "issue[] to [p]ay or [c]lear" before loan closing.[5]

Kohlman was not a party to the fee arbitration, the motion to vacate the arbitration award, and is not a judgment debtor. Nevertheless, to obtain the loan Kohlman needed to satisfy the lender's concerns about title, she paid Mudgett the $701. Waiving interest and postjudgment costs, on February 5, 2019, Mudgett filed a full satisfaction of judgment.

B. *Corey and Kohlman File Suit Against Mudgett*

In January 2019, Corey and Kohlman (collectively, Plaintiffs) filed the Complaint against Mudgett individually and his law offices, doing business as Safer Law. They concurrently filed a notice of related case, referring to Mudgett's action to vacate the arbitration award.

As the trial court noted, all of the claims in the Complaint were "inextricably related to the [fee] arbitration proceedings." The first cause of

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[5] The record does not indicate Alexander Corey's relationship, if any, to Anayansi Corey. There are two grant deeds in the appellate record. One recorded November 6, 2008 names James and Graciela Kohlman as grantors and Anayansi G. Corey as grantee for property described only by street address. The other is recorded August 9, 2013 from Graciela E. Kohlman to herself and "Alexander S. Corey" for property described by lot and map.

action seeks "declaratory relief" based on allegations that Mudgett "never notified" Corey that he was seeking to vacate the arbitration award. Plaintiff also allege that Kohlman paid the $701 under "duress, coercion and manipulation" to obtain a release of "the fraudulent lien."

The second cause of action for "fraud and deceit" alleges both fraudulent inducement and false promise relating to Plaintiffs "entrusting Mudgett to not pursue collections." The third cause of action alleges that by seeking to enforce the $701 judgment against Corey, Mudgett violated the California Military and Veterans Code and the Servicemembers Civil Relief Act (50 U.S.C. §§ 3901–4043) (SCRA) because Corey's husband was on active duty. The fourth cause of action entitled "Intentional Tort" and the Fifth for "Emotional Distress" essentially reallege previously made allegations.

C. *Mudgett's Anti-SLAPP Motion and the Attorney's Fee Award*

Mudgett filed a motion to strike the Complaint under section 425.16. He first asserted that the allegations arose from his protected activity in the fee arbitration and litigation to vacate the arbitration award. Mudgett then argued that the complaint lacked minimal merit because (1) he served Corey with a summons and complaint to vacate the arbitration award; (2) she answered the complaint (thus waiving any defects in service); and (3) Corey personally appeared at the hearing. He also claimed there was no evidence that he fraudulently placed a lien on Kohlman's property, noting that he neither obtained a judgment against Kohlman nor recorded an abstract of judgment in her name. He posited that Corey's "prior ownership" of the property "may explain why a lender required" the $701 judgment "be satisfied before refinancing" Kohlman's loan. Mudgett also submitted e-mails showing the parties had not entered into a settlement agreement, as well as documents reflecting that Corey was not in military service at the relevant

times and no default was taken against her. He further maintained that Corey's "alleged spouse" was not a party and his military service could not have affected Corey's ability to participate in the underlying matters—to the contrary, "she actively participated."

Plaintiffs did not file opposition, but appeared at the hearing. Two days earlier, the court published a tentative ruling proposing to grant the motion, but Plaintiffs had not seen it. The court recessed and gave Plaintiffs the tentative ruling to review. After placing the matter at the foot of the calendar to give them time to think about the tentative, the court invited Corey to present oral argument.[6]

Corey's argument mostly avoided the relevant anti-SLAPP issues—(1) whether the challenged claims arises from activity protected by section 425.16; and, if so (2) whether the plaintiff has demonstrated the merit of the claim by establishing a probability of success. (See *Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 788.) Instead, she repeated her grievances against Mudgett for keeping her $1,500 and having a lien on Kohlman's

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6 "[A]s a general principle, a self-represented litigant who is not indigent 'must expect and receive the same treatment as if represented by an attorney—no different, no better, no worse." (*Nuño v. California State University, Bakersfield* (2020) 47 Cal.App.5th 799, 811.) But those principles do not preclude procedural accommodations like the ones afforded here. Indeed, in giving Corey time to study the tentative ruling, allowing her oral argument despite her failure to file opposition, and later writing a detailed ruling explaining the basis for his decision, Judge Taylor quite commendably "manage[d] the courtroom in a manner that provide[d] all litigants the opportunity to have their matters fairly adjudicated in accordance with the law." (Cal. Code of Judicial Ethics, canon 3B(8); see *id.,* Advisory Com. com., foll. canon 3B(8) ["when a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable the litigant to be heard"]; *Holloway v. Quetel* (2015) 242 Cal.App.4th 1425, 1434.)

property. She explained that half of the $1,500 was actually Kohlman's—because Corey had "a lot of medical issues," knee surgery, and was "wearing a heart monitor" for "breathing issues" and "anxiety." Corey also complained that Judge Schall had vacated the arbitration award without allowing her to speak or to present evidence. She again claimed that the SCRA precluded the anti-SLAPP motion due to her husband's active duty status. Turning to the anti-SLAPP motion, Corey stated only: "This is not a SLAPP case" because it is "not a case based on social media or any organization." She stated, "[t]his all escalated because I won an arbitration" that Judge Schall vacated without allowing her to speak.[7]

Despite Corey's failure to file written opposition or offer any evidence at the hearing, the court analyzed the relevant anti-SLAPP issues in detail, essentially as if she had. First, the court determined, "All claims are inextricably related to the arbitration proceedings. State Bar-sponsored fee arbitration is properly considered protected activity . . . because fee arbitrations are 'an official proceeding established by statute to address a particular type of dispute.' " The court concluded, "This satisfies the first step in the SLAPP analysis."

Turning to the second step, the court separately examined each cause of action and determined Plaintiffs had not established a probability of success on any. The court's analysis is summarized in the table below:

| **Cause of Action** | **Evidence Showing No Probability of Plaintiffs Prevailing** | **Additional Legal Conclusions** |
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[7] The court replied, "In 2014, when [Judge Schall] ruled against you, that was the time to take action, appeal, seek reconsideration, make a motion for a rehearing or some other avenue, but not wait five years and then ask me to unwind what a now retired judge of this court did five years ago."

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| First, declaratory relief | Plaintiff were served with process and were present for hearings. | The underlying claim is for fraud, a three-year statute of limitations applies. Entry of judgment is May 2014. The claim is time barred and, therefore, there is no justiciable dispute or controversy necessary for declaratory relief. |
| Second, fraud | Defendant's declaration and judicially noticeable documents show the lien on Kohlman's property was not fraudulent. | The alleged fraudulent promises were made as far back as April 2014. This count is time-barred by the three-year limitations period for fraud. |
| Third, SCRA | Corey was not on active duty at the time of the alleged violations. Corey's spouse's active duty does not establish any violation because Corey does not allege that her ability to comply with legal proceedings was materially affected by his active duty. | This count is time barred under the applicable four-year limitations period. |
| Four and Five, intentional infliction of emotional distress | No evidence of outrageous conduct or intent. | Time-barred by the one-year limitations period; the alleged lien was recorded in September 2017. |

The court further determined that the Plaintiffs' claims "arise solely from defendant's actions during the arbitration award proceeding" and are, therefore, "protected by litigation privilege under Civil Code section 47, subdivision (b)." In a minute order entered later that day (June 28, 2019, a Friday), the court granted the motion to strike Plaintiffs' complaint.

The next court day, Plaintiffs filed opposition to the anti-SLAPP motion, essentially repeating Corey's oral argument from the previous Friday. At a subsequent hearing, the court commented that even if the opposition had been timely filed, the result would not have changed:

> "I went back and read your untimely opposition after—you know, once I knew it was there . . . it wouldn't have changed a thing."

The court told Corey that her lawsuit against Mudgett "never should have been filed." Corey agreed, stating "we understand that" and she attributed the debacle to the paralegal who "didn't do the job." And in an off-hand remark, the significance of which would not become clear until later, Corey admitted that she failed to file written opposition to the anti-SLAPP motion *because she did not know written opposition was required:*

> "[I]t was an easy case for them, I feel because I'm not an attorney. We did oppose the case. We did not know—*obviously it was our fault, but we did not know that we can oppose—we did not know that we had to respond in writing*. [¶] So I understand we made multiple mistakes . . . ."

On December 11, 2019, the court entered a judgment dismissing Plaintiffs' complaint with prejudice and awarding Mudgett $15,600 in attorney's fees and $1,410.40 in costs.[8]

D. *The Motion to Vacate the Judgment*

On December 20, 2019, Plaintiffs filed a motion to vacate the judgment for "excusable neglect" under section 473, subdivision (b). Corey asserted that she failed to timely file opposition to the anti-SLAPP motion "because of

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8 The appellant's appendix contains what appears to be an unfiled (and second) opposition to the anti-SLAPP motion, this one dated December 19, 2019—which is *after* the court had entered judgment. This document is not listed in the superior court's register of actions , and Corey's brief does not explain its presence in the appellant's appendix.

her health conditions"—namely, she "would faint for unknown reasons" and suffered from "anxiety, headaches and [was] unable to mentally concentrate" all as evidenced by the "heart monitor" she was wearing at the anti-SLAPP hearing. In an accompanying declaration, Corey stated, "I was unable to file the opposition to the special motion to strike in a timely manner because of my illness." She also submitted two papers indicating she had an "EKG Clinic" and "Cardio Echo" appointment on May 17, 2019. But she provided no declaration for any health care provider, nor any medical records to substantiate her claims.

Kohlman likewise sought to excuse her failure to file written opposition to the anti-SLAPP motion, stating she is 75 years old, had recently undergone dental surgery, and had "memory problems and inability to recall the deadlines for filing her pleadings." She also claimed to be "scared" of Mudgett and, as a result, suffered "anxiety, worry, confusion and stress." Apart from her own declaration, Kohlman submitted no other evidence.

Citing title 42 of the United States Code, section 101, Plaintiffs further asserted the SCRA precludes judgment being entered against a "servicemember's wife."[9] Invoking the court's "equitable powers," they also argued that "it is only equitable to allow Plaintiffs to have their day in court" because Corey's "serious health issues" prevented her from filing a timely opposition.

On December 26, 2019, and while this motion was pending, Plaintiffs also sought leave to file a first amended complaint in the dismissed action to (1) add a cause of action by Kohlman for "elder abuse" based on allegations

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9 The citation appears to be a mistake. Title 42 involves the Public Health Service. The SCRA is located at title 50 of the United States Code, sections 3901–4043.

that Mudgett "illegally recorded an abstract of judgment" against Kohlman's property; and (2) attempt to plead around the statutes of limitation.

Mudgett's opposition conceded that under some circumstances, serious illness constitutes excusable neglect under section 473, subdivision (b). But in this case, Mudgett noted that Plaintiffs had over two months between service of the anti-SLAPP motion and the hearing to file written opposition, personally appeared at the hearing, orally argued the matter, and never requested a continuance or leave to file late opposition. Additionally, after the anti-SLAPP hearing on June 28, 2019, and despite Plaintiffs' claims of illness, Plaintiffs made six superior court filings between July 2 and November 6, 2019.

On February 21, 2020 the court conducted a hearing. The minute order reflects that Corey and Kohlman were both present; there was no court reporter. The same day, the court denied the motion to vacate, finding "no merit to the contention that [P]laintiffs were unable to timely file opposition to the special motion to strike due to their illness, health conditions, and age." The court noted that Plaintiffs "personally appeared at the hearing on the special motion to strike" and "did not seek a continuance" or "leave to file late opposition." Moreover, "at no time prior to the hearing on the special motion to strike did plaintiffs indicate they were unable to participate due to illness." Additionally, they offered no "doctor's note or other medical evidence expressly stating plaintiffs were seriously ill, or feeble, or unable to understand that they were being served with process, and thus could not participate in this litigation or file timely opposition to the special motion to strike."

Rejecting Plaintiffs' argument under the SCRA, the court stated, "Corey does not explain how her failure to timely file opposition to the special

motion to strike was materially affected by the military service of her spouse." Elaborating, the court noted:

> "In fact, it seems the service of her spouse did not affect plaintiff Corey given she had the ability to file her complaint, she appeared at the special motion to strike hearing[,] . . . and she undertook litigation activity following the special motion to strike hearing."

## DISCUSSION

### A. *The Appeal is Limited to the February 21, 2020 Order Denying the Motion to Vacate the Judgment and Leave to File An Amended Complaint.*

On March 16, 2020, an attorney filed a judicial council form notice of appeal on Corey's behalf. The box is checked to indicate the appeal is from an order or judgment under section 904.1, subdivision (a)(3)–(13). The place on the form to insert the date of entry, however, was left blank.

1. NOTICE IS HEREBY GIVEN that (name): ANAYANSI COREY
appeals from the following judgment or order in this case, which was entered on *(date)*:
- ☐ Judgment after jury trial
- ☐ Judgment after court trial
- ☐ Default judgment
- ☐ Judgment after an order granting a summary judgment motion
- ☐ Judgment of dismissal under Code of Civil Procedure, §§ 581d, 583.250, 583.360, or 583.430
- ☐ Judgment of dismissal after an order sustaining a demurrer
- ☐ An order after judgment under Code of Civil Procedure, § 904.1(a)(2)
- ☒ An order or judgment under Code of Civil Procedure, § 904.1(a)(3)–(13)
- ☐ Other *(describe and specify code section that authorizes this appeal):*

Attached to the notice of appeal is a copy of the court's minute order entered February 21, 2020 denying the section 473 motion and motion for leave to file an amended complaint. In June 2020, a different appellate attorney filed a Civil Case Information Statement (CCIS) on Corey's behalf. The CCIS states the appeal is from the November 15, 2019 judgment, and attached a copy of that judgment.

Given the apparent inconsistency between the notice of appeal and the CCIS, in July 2015 we sent a letter to the parties asking appellant to explain

"the intended scope of her appeal" and whether the notice of appeal contains the "requisite specificity to permit such appeal." We invited respondent's counsel to weigh in as well.

In response, Corey's lawyer stated "the appeal concerns the February 21, 2020 order only," noting it is appealable under section 904.1, subdivision (a)(2). Counsel enclosed an amended CCIS stating the "date of entry of judgment or order appealed from" is "2/21/2020."[10] Mudgett's attorney took an opposite position, asserting the notice of appeal was fatally defective for failing to specify any judgment or order.

After reviewing the parties' letters, we allowed the appeal to proceed—but only as to the February 21, 2020 order "and not any earlier orders or the judgment, which were independently appealable." We invited the parties to further address appealability issues in their briefs if they chose to do so.

In the respondent's brief, Mudgett again asserts the notice of appeal is fatally unspecific because it does not identify any appealable orders or judgment. He further contends the amended CCIS only adds to the confusion and uncertainty because it indicates the appeal is taken from a judgment after jury trial. He asks that the appeal be dismissed for lack of appellate jurisdiction.

Corey submitted her notice of appeal using optional Judicial Council of California form APP-002 (rev. Jan. 1, 2017). The form has spaces for the appellant to identify the judgment or order being appealed by (1) stating the date of entry; and (2) checking the appropriate preprinted box describing the nature of the judgment or order and basis for appellate jurisdiction. As Mudgett correctly notes, there are two problems with the notice of appeal.

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10 On the amended CCIS, counsel checked the wrong box again. Instead of checking "order after judgment," she checked, "Judgment after jury trial." There never was a trial in this case, let alone a jury trial.

First, the date was left blank. Second, the wrong box was checked. If Corey intended to appeal from the order denying her Code of Civil Procedure section 473 motion, as she asserts, the appropriate box was the one for "an order after judgment under Code of Civil Procedure, § 904.1(a)(2)."[11]

California Rules of Court, rule 8.100(a)(2) provides in relevant part: "The notice of appeal must be liberally construed. The notice is sufficient if it identifies the particular judgment or order being appealed." The rule is intended to " 'implement the strong public policy favoring the hearing of appeals on the merits.' " (*K.J. v. Los Angeles Unified School Dist.* (2020) 8 Cal.5th 875, 882.) Although the timely filing of a notice of appeal is an absolute jurisdictional prerequisite, "technical accuracy in the contents of the notice is not." (*Id.* at p. 883.) "Once a notice of appeal is timely filed, the liberal construction requirement compels a reviewing court to evaluate whether the notice, despite any technical defect, nonetheless served its basic function—to provide notice of who is seeking review of what order or judgment—so as to properly invoke appellate jurisdiction." (*Ibid.*)

The boxes on the notice of appeal form are used to identify the particular subdivision of section 904.1 that authorizes the appeal. Checking the wrong box does not necessarily render a notice of appeal insufficient. For example, in *Ellis Law Group, LLP v. Nevada City Sugar Loaf Properties, LLC* (2014) 230 Cal.App.4th 244, 251 (*Sugar Loaf*), the notice of appeal indicated the subject of the appeal was an order entered on a specified date. Because the notice could only be referring to one such order, the notice of appeal was sufficient even if the wrong box was checked.

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11 An order denying relief under section 473, subdivision (b) is appealable under section 904.1, subdivision (a)(2) as a special order made after final judgment. (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 1004, 1008.)

Here, although Corey's notice of appeal form itself does not state a date, she effectively provided one by attaching the February 21, 2020 order to the notice. Accordingly, the only rational way to construe the notice of appeal is to infer that counsel made a mistake and checked the wrong box; she did not indicate the date of the order being appealed because it was actually attached to the notice of appeal. This may be sloppy legal practice, made worse by an amended CCIS that still checked the wrong box.

Significantly, this court was not misled. Our letter inquiring about the scope of the appeal begins by stating, "The *notice of appeal* filed by appellant Anayansi Corey *indicates* she is appealing from a minute order entered on February 21, 2020 denying her motion to set aside the judgment and for leave to file an amended complaint." (Italics added.) Moreover, any potential for confusion was clarified by Corey's appellate lawyer, who before merits briefs were filed unambiguously responded that "the appeal concerns the February 21, 2020 order only, as the clerk indicated."

By attaching the February 21, 2020 order to the notice of appeal, Corey's notice of appeal in effect stated the date and nature of the order she intended to appeal from. Accordingly, the case is legally indistinguishable from *Sugar Loaf*, *supra*, 230 Cal.App.4th 244—checking the wrong box under these circumstances is not a fatal defect. Accordingly, we deny Mudgett's request to dismiss the appeal, but appellate review is limited to the February 21, 2020 order.

B. *The Court Did Not Abuse Its Discretion In Denying the Motion to Vacate the Judgment.*

Under section 473, subdivision (b), a trial court may relieve a party from a judgment that is the result of her "mistake, inadvertence, surprise, or excusable neglect." "Our review of the trial court's ruling is highly deferential." (*McClain v. Kissler* (2019) 39 Cal.App.5th 399, 413.) Here,

Corey contends the trial court was compelled to vacate the judgment because she was unable to timely file opposition to the anti-SLAPP motion due to "anxiety, headaches" and the inability to "mentally concentrate"—illnesses and conditions for which she had been "undergoing tests, diagnosis and treatment."

This argument fails for several reasons. First and foremost, to obtain relief under section 473, the excusable neglect must be the *actual cause of the judgment*. (*Transit Ads, Inc. v. Tanner Motor Livery, Limited* (1969) 270 Cal.App.2d 275, 279 (*Transit Ads*).) Here, Corey's failure to file written opposition did not contribute to causing, much less cause, the court to grant the anti-SLAPP motion. Corey *did* oppose the motion; she had her day in court by giving oral argument and by being allowed to file late opposition. After considering both, the court stated that even if her written opposition had been timely filed, it would not have changed the ruling.

Moreover, the court could reasonably view Corey's claim of illness and disability with skepticism. At the hearing on attorney's fees, Corey candidly conceded, "it was our fault, but we did not know that we can oppose—we did not know that we had to respond in writing." This, of course, is flatly inconsistent with her claim that medical conditions precluded her from timely filing opposition. Further, Corey (1) filed a verified complaint; (2) participated in arbitration; (3) filed written opposition and appeared in court to oppose a motion to vacate the arbitration award; (4) orally argued the anti-SLAPP motion; (5) filed a written opposition to a cost award and (6) filed a motion to vacate judgment. The fact Corey was able to take these actions despite her alleged illnesses and disabilities is difficult to square with her assertions of incapacity and excusable neglect.

There is also nothing in the record to support a factual determination that illness or disability contributed to Plaintiff's failure to timely file opposition apart from two pieces of paper showing Corey apparently attended "EKG clinic" and "cardio echo" appointments in May 2019. But those appointment slips have scant probative value. They provide no additional detail—no diagnosis, treatment, findings, prognosis, symptoms, or even the reason for the appointment. Plaintiffs submitted no other medical evidence. Specifically, the record contains no declaration from any health care provider. On this record, the court had precious little discretion to do anything other than reject Plaintiffs' claim of excusable neglect. (See *Transit Ads*, *supra*, 270 Cal.App.2d at p. 287 [abuse of discretion to find excusable neglect based on illness where "[a] doctor's declaration was not presented"].)

C. *The Court Did Not Abuse Its Discretion in Denying Leave to File an Amended Complaint.*

In December 2019, six months after the court granted the anti-SLAPP motion, Plaintiffs moved for leave to file a first amended complaint against Mudgett to (1) add a "seventh cause of action" by Kohlman for elder abuse, alleging defendants "forced" her to pay the $701 cost judgment; and (2) attempt to plead around statutes of limitation by alleging delayed discovery "of damage." The trial court denied this motion on several grounds, including that the elder abuse cause of action stems from the same conduct that was the subject of the Complaint. Thus, granting the motion for leave to file a first amended complaint would result in a new special motion to strike and undermine the purpose of the anti-SLAPP statute. Corey contends the court abused its discretion in denying leave to file the amended complaint. Citing *Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858 (*Nguyen-Lam*), she asserts the court should have allowed the amendment "to allow evidence . . . to show probability of prevailing on the merit[s]."

" '[S]ection 425.16 provides no mechanism for granting anti-SLAPP motions with leave to amend.' [Citation.] Courts have routinely concluded that plaintiffs may not be permitted to evade the intent of the anti-SLAPP statute by amendment once faced with an anti-SLAPP motion. [Citations.] One of the reasons that a plaintiff is not permitted to amend in the face of an anti-SLAPP motion, and particularly after obtaining a ruling on an anti-SLAPP motion, is to prevent a lawsuit from becoming a moving target and thereby undermining the very purpose of the statute . . . ." (*Medical Marijuana, Inc. v. ProjectCBD.com* (2020) 46 Cal.App.5th 869, 897 (*Medical Marijuana, Inc.*).)

*Nguyen-Lam*, *supra*, 171 Cal.App.4th 858 presents a narrow exception to this rule. There, the plaintiff filed a complaint for defamation, but failed to clearly plead the element of actual malice. (*Id.* at pp. 868.) But evidence submitted in connection with the anti-SLAPP motion was sufficient to establish a prima facie case that the defendant had acted with actual malice. (*Ibid.*) Under those circumstances, the court permitted the plaintiff to amend her complaint to allege the actual malice supported by the evidence already before the court. Significantly, the proposed amendment in *Nguyen-Lam* would not affect the defendant's showing that the complaint arose out of protected activity. The amendment in effect was one to amend the complaint to conform to proof. (*Id.* at p. 873 ["the trial court did not err in permitting plaintiff to amend her complaint to plead actual malice in conformity with the proof presented at the hearing on the strike motion"].) Because the plaintiff had demonstrated a probability of prevailing at trial if she could amend her complaint to include actual malice, the *Nguyen-Lam* court concluded, " " '[d]isallowing an amendment would permit [the] defendant to

gain an undeserved victory" ' " because the plaintiff had demonstrated the requisite probability of success. (*Ibid*.)

Here, unlike the procedural setting in *Nguyen-Lam*, Plaintiffs sought by amendment to assert an entirely new cause of action for elder abuse. They also sought to add allegations that Mudgett wrongfully disclosed certain "confidential, private information." The trial court correctly determined that the proposed amended complaint would trigger a fresh motion to strike, and would allow " 'a plaintiff [to] accomplish indirectly what could not be accomplished directly, i.e., depleting the defendant's energy and draining his or her resources,' " which would, in turn, " 'totally frustrate the Legislature's objective of providing a quick and inexpensive method of unmasking and dismissing such suits.' " (*Medical Marijuana, Inc.*, *supra*, 46 Cal.App.5th at p. 900.) The trial court acted within its discretion in denying leave to file the proposed first amended complaint.[12]

Moreover, *Nguyen-Lam*, *supra*, 171 Cal.App.4th 858 also does not support amending the complaint to attempt to plead around the statute of limitations. As already discussed, Plaintiffs offered no evidence at the hearing on the anti-SLAPP motion. Absent any evidence of delayed discovery, there was no basis for amending the complaint to conform to proof in the manner *Nguyen-Lam* allows.

DISPOSITION

The orders entered February 21, 2020 are affirmed. In the interest of justice, each party to bear their own costs.

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12 This disposition makes it unnecessary to consider Mudgett's argument that Corey is not aggrieved by the ruling and, therefore, lacks standing.

DATO, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.